

UNITED STATES  
v.  
PAUL WATKINS

IBLA 79-572

Decided December 15, 1980

Appeal from decision of Administrative Law Judge R. M. Steiner declaring the Queen Lazulite, Queen Azule, and Queen of Light lode mining claims null and void and dismissing the Government's complaint against the Kyanite Queen lode claim. Contest No. CA-5175.

Reversed in part.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Contests

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and is present within the limits of the claim.

3. Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of discovery, a prima

facie case has been established, and if not rebutted, the mining claim is properly declared invalid.

APPEARANCES: John McMunn, Attorney, Office of the Solicitor, U.S. Department of the Interior, San Francisco, California, for the Government; Paul Watkins, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Bureau of Land Management, through the Office of the Solicitor of the Department of the Interior, has appealed that portion of a decision of Administrative Law Judge R. M. Steiner, dated August 9, 1979, dismissing the complaint in contest No. CA-5175 against the Kyanite Queen lode mining claim. The remainder of the Judge's decision which declared the Queen Lazulite, Queen Azule, and the Queen of Light lode mining claims null and void, is unaffected by the Government's appeal. Nor did the mining claimant, Paul Watkins, file a timely appeal concerning these claims. Therefore, the Judge's decision as to these three claims is the final administrative ruling of the Department.

The Kyanite Queen lode claim is located within the Death Valley National Monument, Inyo County, California. The contest was initiated by the Bureau of Land Management (BLM) on behalf of the National Park Service (NPS) when the BLM filed a complaint July 5, 1978, charging, inter alia, that "[t]here are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery."

After the contestee filed a timely answer generally denying the charges, a hearing was held on the contest December 7, 1978, in Sacramento, California. The Judge concluded from the evidence presented at the hearing that a prudent person would have been justified in expending his time and means with a reasonable prospect of success in developing a valuable mine on the Kyanite Queen claim at the time of the withdrawal, and as of the time of the hearing. Therefore, he dismissed the complaint as to this claim. However, he found contestee failed to prove that any significant amount of "lazulite" exposed on these claims was marketed at the time of withdrawal and that the Queen Lazulite, Queen Azule, and Queen of Light lode mining claims were null and void.

The Government appeals the Judge's dismissal of the complainant against the Kyanite Queen.

Appellant contends the Judge erred in his dismissal of the contest complaint against the Kyanite Queen claim on the basis that the dismissal is unsupported by the evidence in the record and is contrary to established law.

The Judge succinctly summarized the testimony and evidence adduced at the hearing as follows:

Amos F. Klein, after having been duly qualified as a geologist, testified [for the Government] that he examined the Queen group of lode mining claims on March 29, 1978, with Paul Watkins. (Tr. 16). The claims are twelve miles northeast of Furnace Creek in the northern Funeral Mountains. The topography is extremely rough with steep slopes. The geology of the area is a huge north-east trending uplift characterized by metamorphic rocks of the pre-Cambrian Palm series which include thick bedded easterly dipping quartzite conglomerates, shales, argillites and some limestones. (Tr. 17). Workings on the claims exposed interbedded white quartz bodies. Only the quartz was removed. The principal mineral is lazulite, which is used for jewelry. (Tr. 18).

Mr. Klein took samples from the discovery points designated by Mr. Watkins. Except for the Kyanite Queen claim, no standard mineral sampling was conducted on the claims for minerals other than lazulite. (Tr. 19). A 1.2-foot long chip sample was taken across a quartz vein found in a 22-foot long x 3-foot wide prospect pit on the Kyanite Queen claim. An assay report from Herbert M. Ochs, a chemist from Denver, Colorado revealed that there was only a trace of gold in the sample. (Tr 21, Ex. 1). Lazulite samples taken from the Queen Azure Claim were introduced into evidence. (Ex. 2). He stated that the lazulite Mr. Watkins is mining has no commercial value. In order to have value, the lazulite must occur in crystalline form and be clear blue. (Tr. 25). The lazulite samples have no value. He consulted the Tavernier jewelry firm in Denver, Colorado, and Louise Erb. Both indicated that the lazulite samples were only of specimen interest. Clear blue lazulite is worth up to \$100 a carat. (Tr. 26). He also contacted Mr. Bill Larson of Tala Properties, Inc., Fallbrook, California, who confirmed the fact that clear blue lazulite could have a retail value of \$100 a carat. (Tr. 26).

It was his opinion that a prudent person would not be justified in expending further labor and expense in developing a mine on the Queen group of claims. He determined this after he found that the lazulite he uncovered does not occur in crystals and was not clear. Furthermore, the lazulite is highly disseminated on the claims and too small to be used for jewelry purposes. He stated:

There are specimens in there that would probably be large enough that it could be used in jewelry if it occurred in a crystalline form but it does not. It is disseminated within a quartz body

and in fact it is highly disseminated and you have to do a lot of looking to find it, but I think the critical thing here is it lacks the necessary character.

On cross-examination, Mr. Klein stated that he had never seen lazulite prior to this particular examination. (Tr. 28). He spent a total of 4 to 5 hours on the claims. By visual observation, he determined that the subject lazulite was opaque. (Tr. 31). Because the geology of the area is wrong for the occurrence of lazulite in crystals, he concluded that there is no possibility of the occurrence of valuable deposits of lazulite on the Queen group of claims. (Tr. 34). When he was shown a lazulite specimen by the Contestee, Mr. Klein denied that it was a crystal [Tr. 36].

\* \* \*

\* \* \* \* \*

Mr. Klein's knowledge of lazulite includes information received from the two jewelry companies he contacted. (Tr. 37). He stated that lazulite is a rare mineral. The largest lazulite specimens he saw were cut and weighed one carat to two carats. (Tr. 38). Those specimens were from Canada. He had never seen lazulite in an uncut crystal form. (Tr. 40). He did not take any samples from the Queen Lazulite claim. (Tr. 43). No lazulite was found on the Queen of Light claim. (Tr. 44). A two-foot wide quartz vein is exposed in a prospect pit on the Kyanite Queen claim. (Tr. 44). The same quartz bed runs through all of the claims.

Paul Watkins stated that he began prospecting for lazulite on the claims in the 1970's. (Tr. 50). He displayed a box of lazulite specimens taken from the claims. He described the specimens as "translucent to transparent." Their values ranged from five hundred dollars to thirty-five hundred dollars each.

He could not state precisely from which claim each of the displayed specimens were taken. However, he had been mining the lazulite up until the moratorium in 1976 and "making a decent living." He stated that the Government geologist spent "no more than fifteen minutes at each mineral location." Most of the four-hour examination was spent "walking down the hillside trying to find a place to get picked up by the helicopter." It was his opinion that only one hour was consumed actually cutting samples, not sufficient to determine the existence or non-existence of minerals on the claims. (Tr. 56). Some of the specimens, if sliced, would reveal translucent quality lazulite.

He had invested almost five thousand dollars in the Valley View claims and the Queen Group because he was convinced that the minerals exist there in a quantity which will make a bona fide profitable mining venture of the Queen Group.

On cross-examination, Mr. Watkins stated that he owns the Sun Gallery rock shop where he has sold lazulite. (Tr. 59). Half of his sales are for lazulite, both cut and polished and rough and set into jewelry. (Tr. 77). He has sold lazulite to wholesale jewelers in Las Vegas. He refused to disclose the quantities sold. (Tr. 60). Depending on the quality of the lazulite, the price fluctuates from \$2 a carat for translucent lazulite to \$100 a carat for transparent. (Tr. 61). Opaque masses are forty to eighty cents per carat. "Mine run" material sells for about \$25 per pound. He has \$2,500 invested in equipment. It takes him an hour to mine, grade, cut and polish a stone of lazulite. (Tr. 62). He sold about a hundred pounds of mine run rocks. (Tr. 64). In addition, he has sold over 300 cut and polished stones of various cuts and weights. (Tr. 65). He sells two stones a week at his rock shop. (Tr. 65). A total of \$3,500 worth of rough stones has been sold. (Tr. 72). Most of his sales have been for polished and cut stones. A total of \$7,500 in polished and cut stones have been sold. (Tr. 73). He started mining in the summer of 1974. About half of these stones have come from the Valley View claim. He has done most of his work on the Queen Lazulite claim. He has no recollection of what amounts of lazulite have been mined from each contested claim. (Tr. 75)

Lazulite is one of the rarest minerals. The largest pieces known to man are a carat and a half. Sapphires and diamonds exist in greater quantities. The lazulite occurs in massive deposits and can be used as gems or ornamental stones. (Tr. 81). He had sold translucent lazulite for seventy-five dollars a carat, but the "high average" sale price for "top quality" lazulite was two or three dollars a carat. "Every bit of blue material" removed from his claims is saleable, some high grade and some low grade. He sold more unset lazulite than that set in jewelry. He had a stockpile of two hundred and fifty pounds of lazulite.

Mrs. Jon Watkins testified that she had assisted in the removal of lazulite from the claims in quantities ranging from twenty to forty pounds. In a single day, she would recover five or ten pounds of small stones approximately three-eighths of an inch wide. A typical two carat stone would sell for seventy-five to one hundred and twenty-five dollars in the Sun Gallery. Approximately one-half of the lazulite that has been sold was removed from the Valley View claim, the other half from the contested claims.

Valuable mineral deposits on lands belonging to the United States within Death Valley National Monument were open to operation of the mining laws prior to September 28, 1976, the date of enactment of P.L. 94-429, 90 Stat. 1342, 16 U.S.C. §§ 1901-1912 (1976). 30 U.S.C. § 22 (1976). Location of a mining claim conveys no rights to the claimant until there is shown a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23, 35 (1976).

[1] A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616, (9th Cir. 1968); cert. denied, 393 U.S. 1025 (1969). This test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, *supra*; Converse v. Udall, *supra*.

When a contestee is seeking to validate a group of mining claims he must prove a valuable mineral deposit exists on each individual claim. A showing that all the claims taken as a group satisfy the requirements of discovery is not sufficient. United States v. Rogers, 32 IBLA 77 (1977); United States v. Colonna & Co., 14 IBLA 220 (1974). For a mining claim to be valid the required discovery must be made within the limits of the claim as located, as a discovery outside the claim cannot serve to validate despite the proximity of the discovery to the claim. United States v. Clear Gravel Enterprises, Inc., 505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930 (1975). While geologic inference based upon knowledge of the degree of mineralization prevalent within the surrounding area cannot be substituted for the actual exposure of a mineral deposit within a claim, it may be relied upon as an aid to calculate the extent and potential value of the mineral deposit, once the mineral-bearing minable material has been exposed. United States v. Chambers, 47 IBLA 102 (1980); United States v. Henault Mining Co., 73 I.D. 184 (1966), aff'd, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

When land is closed to location under the mining law subsequent to the location of a mining claim, the claim cannot be recognized as valid unless (a) all requirements of the mining law, including discovery of a valuable mineral deposit, were met at the time of the withdrawal, and (b) the claim presently, *i.e.*, at the time of the hearing, meets the requirements of the law. United States v. Peterson & Sweet, 47 IBLA 92 (1980); United States v. Porter, 37 IBLA 313 (1978).

[2] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a *prima facie* case; then the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829, rehearing denied, 423 U.S. 1008 (1976); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). It is thus crystal clear that the mining claimant is the proponent of an order to declare his claim valid, so that, pursuant to the Administrative Procedure Act, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, supra; United States v. Arcand, 23 IBLA 226 (1976).

[3] The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and found the mineral values exposed as being insufficient to support the finding of discovery. United States v. Arcand, supra; United States v. Hallenbeck, 21 IBLA 296 (1975). The mineral examiner's conclusion must be based upon reliable, probative evidence, United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971), but the examiner is not required to perform discovery work, or to conduct drilling programs for the benefit of the claimant. United States v. Garner, 30 IBLA 42 (1977); United States v. MacIver, 20 IBLA 352 (1975).

The Government argues on this appeal that it established a prima facie case that there was no discovery on the Kyanite Queen claim and that the contestee did not overcome this case with a preponderance of the evidence. From our review of the record we agree.

The Government established a prima facie case of no discovery of a valuable mineral deposit on the Kyanite Queen claim through the testimony of Amos F. Klein, a geologist. Mr. Klein had examined the Queen group of claims March 29, 1978, while accompanied by the contestee, Paul Watkins. Klein was guided on the claims by Watkins while samples of "lazurite" were taken from various workings on the claims (Tr. 18). Klein indicated that no lazulite samples were taken from the Kyanite Queen. He testified that Watkins had indicated the principal reason for having this particular claim was the gold on the property (Tr. 28). Accordingly, a standard sample was taken across a quartz vein while looking for possible deposits of gold (Tr. 19). An assay report of this sample (Exh. 1) showed only a trace of gold, not commercially valuable (Tr. 21-22). Klein also testified that it was his opinion that the lazulite specimens taken from the other claims were of no economical value (Tr. 24-28). The Judge found this testimony and evidence constituted a prima facie case that the Kyanite Queen claim was invalid.

Watkins did not offer any other evidence as to gold values on the Kyanite Queen claim, nor did he attempt to show through his own testimony or evidence that he had ever taken valuable samples of lazulite from this particular claim. Contrary to the Judge's conclusion that Watkins successfully rebutted the Government's case, we find no support for such a finding in the record. There is no evidence to show that the claimant has a discovery of lazulite on the Kyanite Queen claim. The Judge referred to the testimony of Jon Watkins (Tr. 97) to

substantiate recovery of lazulite specimens from this claim. However, the record shows she was not sure from which claims the specimens were taken and that she was unclear as to the names and locations of the various claims they had worked (Tr. 94-97). This is far short of credible evidence that lazulite has definitely been recovered from this particular claim.

Moreover, it also appears that Watkins merely confirmed the strength of the Government's case against the Kyanite Queen claim where on cross-examination of Klein it developed as follows:

By Mr. Watkins:

Q. So, Mr. Klein, you have, let's just go over this one more time, you have testified that all the claims have within their confines the quartz vein containing the lazulite that, oh, besides the Kyanite Queen which did not show any lazulite, and we took the gold sample from, so . . .

A. To my knowledge we are talking about the same quartz vein or quartz bed with the exception of the Kyanite (sic) Queen Tr. 46, at 3-12. [Emphasis added.]

Later in his own testimony Watkins made a statement in the record in which he indicated that the principal mining claim of interest in the area of his claims was the Valley View claim, which he did not own and which was not involved in this contest (Tr. 50). He then displayed an assortment of specimens of rock which were allegedly from some of his claims, as well as from the Valley View claim (Tr. 50-55). When specifically asked where these stones came from he replied:

These come from all of the claims except for the Kyanite Queen which I consider to be more of a buffer claim on the high end of the group so that no one gets too close to the Valley View so that nobody can come in and claim the Valley View.

(Tr. 55).

The transcript in this case leaves much to be desired. Until page 34 of the transcript, all references are to "LAZURITE," a sodium aluminum silicate containing sulphur. This mineral is a constituent of lapis lazuli. It is found in California, among other places, usually in massive rather than crystalline formation. Following page 34, all references are to "LAZULITE," a hydrous aluminum phosphate with either magnesium or iron. This mineral also is usually found in massive rather than crystalline formation, and does occur in California. Both "lazurite" and "lazulite" are blue in color, and both have use as minor gem stones. Without a chemical or blowpipe test, it is difficult to distinguish one from the other, or even from other blue minerals. A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, p. 630 (1968).



The Government's witness admitted that he had never seen "lazurite" (lazulite) prior to his examination of the claims. He did not indicate he had made any tests to determine the precise identification of the mineral, relying apparently on the designation given by the claimant.

It is questionable that the Government made a prima facie case of no discovery. However, even though the Government's case is weak or nonpersuasive, the Judge may examine the total record and apply any deficiencies in the claimant's case against him. United States v. Taylor, 19 IBLA 9 (1975), 821 I.D. 68 (1975). So in this case, with relation to the Kyanite Queen claim, the claimant explicitly stated that the stones he exhibited had been recovered from all of his claims except the Kyanite Queen, which he considered as a protective buffer for his other claims in the area. Also, he had indicated to the Government's examiner that the Kyanite Queen was valuable for gold, indicating a place which he desired to be sampled. The sample taken, however, showed no value for gold. The absence of gold plus the admission of the claimant that he had not taken any "blue" stones from the Kyanite Queen is not a preponderance of favorable evidence over the Government's showing.

In view of this testimony and the absence of any substantive evidence in the record to show any development or work from the Kyanite Queen claim, we find that the contestee did not preponderate over the evidence presented by the Government with respect to this claim.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed in part and we find that the Kyanite Queen claim should also have been declared null and void.

---

Anne Poindexter Lewis  
Administrative Judge

I concur:

---

Douglas E. Henriques  
Administrative Judge

## ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur that the Government's complaint against the Kyanite Queen lode claim should not have been dismissed and that the claim should be declared null and void. I disagree, however, that there was any weakness as to the Government's case against the claim. The Government geologist testified he examined and sampled the claim because contestee told him it contained gold (Tr. 19) and the Ochs assay report showed there was no gold of any value (Tr. 20-22). While cross-examining the geologist, contestee admitted the Kyanite Queen "did not show any LAZULITE" (Tr. 46), quoted, supra.

---

Joseph W. Goss  
Administrative Judge

